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No. 07-526

IN THE
Supreme Court of the United States

DONALD L. CARCIERI,
Governor of Rhode Island, ET AL.,
Petitioners,
v.

DIRK KEMPTHORNE,
Secretary of the Interior, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY BRIEF FOR PETITIONER DONALD L. CARCIERI

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REPLY BRIEF FOR PETITIONER DONALD L. CARCIERI

The Secretary's defense of his decision to take the disputed 31-acre parcel into trust on behalf of the Tribe pays little heed to the sovereign interests of the State of Rhode Island. Indeed, the Secretary's authority to take land into trust—and to divest state and local authorities of jurisdiction over that land—unquestionably imposes a substantial burden on state sovereign interests. Because land held in trust for a tribe is largely exempt from the State's criminal and civil jurisdiction, the State generally lacks the authority to regulate criminal conduct, health-and-safety standards, commercial transactions, and environmental conditions on such land—even though the land is situated within the State's territorial boundaries, may border heavily populated areas, and may have been subject to continuous state jurisdiction for hundreds of years.

In light of a trust acquisition's profound consequences for state sovereign interests, Congress restricted the Secretary's trust authority under the Indian Reorganization Act ("IRA") to those Indian tribes that were most urgently in need of federal assistance at the time of the IRA's enactment—*i.e.*, those tribes that had been dispossessed of their land through the federal government's allotment policy. This restriction is unambiguously embodied in the IRA's definition of "Indian," which (as relevant here) limits the statute's scope to "persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added).

The Secretary seeks to expand his trust authority beyond the IRA's statutory boundaries by taking land into trust for the Narragansetts, a tribe that was neither federally recognized nor under federal jurisdiction at the time of the IRA's enactment in 1934 and that was not subject to the federal government's allotment policy. In so doing, he also attempts to evade the limitations imposed on his trust authority by the Rhode Island Indian Claims Settlement Act ("Settlement Act"), which extinguished "all Indian [land] claims" within Rhode Island (J.A. 27a), including trust applications asserting claims to sovereign authority over land.

The Secretary's approval of the Tribe's trust application—and his arguments in defense of that decision in this Court—cannot be squared with the text, structure, or purpose of either the IRA or the Settlement Act.

I. THE IRA UNAMBIGUOUSLY RESTRICTS THE SECRETARY'S TRUST AUTHORITY TO TRIBES THAT WERE FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934.

When Congress enacted the IRA in 1934, it restricted the Secretary's trust authority to "recognized Indian tribe[s] now under Federal jurisdiction." 25 U.S.C. § 479. The Secretary's reading of "now" to mean "at any future time when the statute is applied" disregards several well-established canons of construction—not to mention, the unambiguously expressed views of Commissioner of Indian Affairs John Collier, a principal architect of the IRA and author of the disputed statutory language.

A. The Plain Language Of The IRA Forecloses The Secretary's Expansive Interpretation Of His Trust Authority.

1. The IRA limits the Secretary's trust authority to those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment by declaring that the Secretary may use that far-reaching authority *only* "for the purpose of providing land *for Indians*." 25 U.S.C. § 465 (emphasis added). In turn, Congress defined the term "Indian" (as relevant here) as "all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." *Id.* § 479 (emphasis added). This definition restricts the Secretary's trust authority to individual Indians who are members of tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934 and to tribes whose members meet those statutory criteria. The Secretary therefore may not take the disputed 31-acre parcel into trust for the Narragansett Tribe—and strip the State of jurisdiction over that land—because it is undisputed that the Tribe was not federally recognized and under federal jurisdiction in 1934. U.S. Br. 7; J.A. 22a.

Ordinary principles of statutory construction leave no room for reasonable debate on this point. Congress regularly uses the term "now" to refer to conditions "at the time" Congress was "speaking" (*Webster's New International Dictionary of the English Language* 1671 (2d ed. 1939))—*i.e.*, at the time of the statute's enactment. *See Montana v. Kennedy*, 366 U.S. 308, 312 (1961); *Franklin v. United States*, 216 U.S. 559, 569 (1910). And there is absolutely no doubt that Congress used "now" in this way in other

sections of the IRA, including in the section that affords the Secretary his trust authority. *See* 25 U.S.C. § 465 (referring to "measures *now* pending in Congress") (emphasis added); *see also id.* § 484 (later-enacted provision of the IRA referring to "water rights *now* vested in" a tribe) (emphasis added). Because "identical words used in different parts of the same statute are . . . presumed to have the same meaning" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006)) (alteration in original; internal quotation marks omitted), the statutory context unequivocally demonstrates that Congress intended the term "now" in Section 19 of the IRA to restrict the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction at the time of the statute's enactment. Indeed, the Court has read Section 19 to impose this very limitation. *See United States v. John*, 437 U.S. 634, 650 (1978) (construing Section 19 as requiring "Indian" status to be determined as of 1934).

Any conceivable doubt on this point is removed when Section 19 is juxtaposed with those sections of the IRA in which Congress referred to post-enactment developments through the use of the phrase "now *or hereafter*." *See* 25 U.S.C. § 468; *id.* § 472; *see also id.* § 475a (later-enacted provision). If Congress had intended to extend eligibility for trust acquisitions to tribes that obtained federal recognition after the IRA's enactment, it would have used this "now or hereafter" formulation in Section 19—or would have omitted a temporal qualifier altogether.[1]

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[1] To extend IRA eligibility to tribes that were federally recognized after 1934, Congress could also have expressly stated in Section 19 that the definition of "Indian" encompasses persons

The Department of the Interior circular disclosed by the Secretary after nearly a decade of litigation in this case demonstrates that this reading of the IRA was shared by Commissioner of Indian Affairs John Collier. *See* U.S. Dep't of Interior, Circular No. 3134, Enrollment Under the IRA 1 (Mar. 7, 1936) ("Section 19 of the [IRA] provides, in effect, that the term 'Indian' as used therein shall include . . . all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act."). This document is highly probative not only because it discloses the Department of the Interior's official position regarding the IRA's scope shortly after the statute's enactment but also because Commissioner Collier was "a principal author of the Act." *United States v. Mitchell*, 463 U.S. 206, 221 n.21 (1983). Indeed, Commissioner Collier proposed the addition of the term "now" to the definition of "Indian" in Section 19 in order, as he explained it, to "limit the act to the Indians now under Federal jurisdiction." *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm.*

[Footnote continued from previous page]

of Indian descent "who are members of any recognized Indian tribe under Federal jurisdiction *at the time of application* for benefits." Indeed, numerous federal statutes incorporate this "time of application" language or a similar formulation. *See* 20 U.S.C. § 1099e(c)(2) ("The term 'Asian American and Native American Pacific Islander-serving institution' means an institution of higher education that is an eligible institution under section 1058(b) of this title and *at the time of application*, has an enrollment of undergraduate students that is at least 10 percent Asian American and Native American Pacific Islander students.") (emphasis added); 16 U.S.C. § 824a-3(j)(2).

on Indian Affairs, 73d Cong. 266 (1934). Two years after the statute's enactment, Commissioner Collier, speaking on behalf of the Department, interpreted Section 19 as having accomplished precisely that result by limiting IRA eligibility to "recognized tribe[s] that [were] under Federal jurisdiction at the date of the Act." Circular No. 3134, *supra*, at 1. This "contemporaneous interpretation of [the] challenged statute by [the] agency charged with its enforcement"—and by the author of the disputed language—is entitled to "great weight." *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983).[2]

2. Confronted with the unequivocal language of the IRA, the Secretary strives to inject ambiguity where none is present. But ambiguity is not a creature of mere "definitional possibilities" and interpretive speculation (*Brown v. Gardner*, 513 U.S. 115, 118 (1994)), and each of the Secretary's attempts to suggest that Congress actually intended the term "now" to mean "later" falls well short of the mark.

The Secretary initially attempts to navigate around the "now under federal jurisdiction" limitation in the IRA's definition of "Indian" by contending

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[2] Other Department of the Interior documents that the Secretary lodged with this Court demonstrate that the Department explicitly endorsed this reading of the IRA on several future occasions. *See* Letter from Acting Secretary of the Interior to David H. Getches 8 (Oct. 27, 1976) (refusing to take land into trust on behalf of the Stillaguamish Tribe in part because "the Solicitor has some doubts that the Department can take land in trust under 25 U.S.C. § 465 for tribes that were not administratively recognized on the date of that act") (emphasis omitted); Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs 6 (Oct. 1, 1980) ("it is clear that the definition of Indian requires that some type of obligation or extension of services to a tribe must have existed in 1934").

that the restriction is altogether irrelevant when the Secretary takes land into trust on behalf of a tribe, rather than an individual Indian. U.S. Br. 12. To make this argument, the Secretary is forced to nullify the first sentence of Section 5, which authorizes the Secretary to use his trust authority only "for the purpose of providing land *for Indians*." 25 U.S.C. § 465 (emphasis added). According to the Secretary, the term "Indians" in this clause does not incorporate the definition of "Indian" in Section 19 of the IRA and instead refers generically to an undefined class of persons, leaving the Secretary free to take land into trust for any "Indian tribe or individual Indian" under the last sentence of Section 5. U.S. Br. 12.

Taken together with the Secretary's argument that the definition of "Indian" in Section 19 is both nonexhaustive (U.S. Br. 26) and irrelevant to whether a group constitutes an "Indian tribe" (*id.* at 13), the Secretary's reading of Section 5 would effectively grant him the discretionary authority to divest a State of jurisdiction over *any* land and take that land into trust "for the purpose of providing land" for *any* individual or group. Congress's delegation to the Secretary of such unfettered discretion to abrogate state sovereignty for the benefit of any group that he deems, at his whim and fancy, to be an "Indian tribe," or any individual he deems to be an "Indian," would raise serious constitutional concerns. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("when Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform") (internal quotation marks and emphasis omitted; alteration in original). The IRA should be construed to avoid these difficult constitutional ques-

tions by giving the "purpose of providing land for Indians" clause in Section 5 its natural reading, which restricts the Secretary's trust authority to persons who meet the statutory definition of "Indian" and to tribes whose members meet that definition. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

Moreover, even if the Secretary were correct that the term "Indians" in the first sentence of Section 5 is a generic, meaningless term that does not impose any constraints on the Secretary's trust authority, he is most decidedly wrong when he suggests that the last sentence of Section 5 authorizes the Secretary to take land into trust on behalf of any tribe without regard to whether the tribe's members are "Indians" under Section 19. U.S. Br. 13. The Secretary's argument depends upon reading additional language out of Section 5—this time, the term "Indian" in the sentence providing that land acquired by the Secretary "shall be taken . . . in trust for the *Indian* tribe." 25 U.S.C. § 465 (emphasis added).

Congress presumably intended for the word "Indian" in the phrase "Indian tribe" to serve some function. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The term's only conceivable function is to incorporate the definition of "Indian" in Section 19 of the IRA—thereby limiting the Secretary's trust authority to tribes whose members satisfy that definition. *See* Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs 2 (Oct. 1, 1980) ("the definitions of 'Indian' and 'tribe' must be read together"). The scope of the Secretary's trust authority is thus ultimately the same whether the "purpose of providing land for Indians" clause in the first sentence of Section 5, or the "Indian tribe or individual Indian" clause in the last sentence of Sec-

tion 5, defines the scope of that authority. Either way, when the Secretary invokes his authority to take land into trust on behalf of a tribe, that tribe's members must be "Indians" within the meaning of the IRA.

Indeed, the Secretary himself has always recognized that, in practice, the words "Indian" and "tribe" in the last sentence of Section 5 must be read together. If land could be acquired in trust for a tribe whose members did not meet one of the three definitional criteria in Section 19—membership in a federally recognized tribe, descent from a tribal member, or blood quantum—then the Secretary could take land into trust on behalf of *any* tribe of Indians, even one that is recognized only under state law. But the Secretary has *always* required a tribe to be federally recognized—if not in 1934, then at least at the time when its trust application is submitted—for land to be taken into trust on its behalf. Indeed, the Secretary not only acknowledges this limitation in his brief (at 11), but has unambiguously embodied this restriction in his regulations governing trust acquisitions. *See* 25 C.F.R. § 151.2(b) ("*Tribe* means any Indian tribe . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.").

The Secretary further contends that, even if the statutory definition of "Indian" is relevant to the scope of his authority to take land into trust for Indian tribes, he has the authority unilaterally to expand the meaning of that term because the definition of "Indian" in Section 19 is introduced by the phrase "shall include." U.S. Br. 26. But while the word "include" may sometimes introduce a non-exhaustive list of terms, Congress also regularly uses the term to denote an exhaustive list. *See*, *e.g.*, *United States*

v. Monsanto, 491 U.S. 600, 607 (1989). The function served by the term therefore depends upon the statutory context, and it strains credulity to suggest that Congress crafted a precise and carefully delineated definition of three classes of "Indians" in Section 19 of the IRA, only to authorize the Secretary to undermine that careful line-drawing by unilaterally expanding the definition of "Indian" as he sees fit. Not only is this reading of "include" inconsistent with the precision that Congress used in defining the term "Indian" for purposes of the IRA, but—as with the Secretary's reading of the "purpose of providing land for Indians" clause in Section 5—it would also generate grave constitutional concerns because Congress would have failed to impose *any* meaningful constraints on the Secretary's authority to place land under the sovereign control of an Indian tribe.

The Secretary's quibbling with petitioners' reading of the definition of "Indian" in Section 19 is also insufficient to create ambiguity regarding the meaning of the "now under federal jurisdiction" limitation. The Secretary contends, for example, that Congress would have used a specific date, or the phrase "at the time of the passage of this Act," if it had intended to limit the definition of "Indian" to members of tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment. U.S. Br. 16-17. But the Secretary's hypothesis is obliterated by the fact—undisputed by the Secretary or his *amici*—that "Congress used 'now' elsewhere in the IRA to refer to 1934" (U.S. Br. 19 (citing 25 U.S.C. § 465)) and the phrase "now or hereafter" to encompass post-enactment developments. 25 U.S.C. § 468; *id.* § 472; *see also* Nat'l Congress of Am. Indians Br. 15 (in Section 5 of the IRA, "the word 'now' surely means 'in 1934'"). Congress's use of the phrase "now

under federal jurisdiction" in Section 19—rather than "now or hereafter under federal jurisdiction"—thus unambiguously conveys Congress's intention to restrict the definition to tribes that were federally recognized and under federal jurisdiction at the time of enactment.[3]

The Secretary also attempts to save his reading of the term "now" from superfluity by arguing that its inclusion in Section 19 was necessary to "exclude[ ] members of tribes that may once have [been federally recognized and under federal jurisdiction], but no longer" are at the time they submit a trust application. U.S. Br. 20. But, if that was Congress's intention when enacting Section 19, it could have accomplished exactly the same result by simply omitting the term "now" altogether, which would have limited trust eligibility to tribes that were federally recognized and under federal jurisdiction at the time of the trust acquisition and excluded tribes that were federally recognized at the time of the IRA's enactment but thereafter lost their federal recognition.

[3] The Secretary is incorrect when he states that this Court construed the phrase "now or hereafter" in *United States v. Reily*, 290 U.S. 33 (1933), to mean something other than "at the time of enactment and thereafter." In construing the Act of June 21, 1906, which removed the restrictions on the alienation of allotted Indian land when inherited by an heir living in a foreign country, the Court explicitly adopted the Tenth Circuit's construction of the statute, which determined whether the restriction on alienation had been removed by inquiring whether the heir resided in a foreign country "'*on the twenty-first day of June, 1906*, and thereafter,'" and inherited the land at the time he was still living in a foreign country. *Id.* at 40 (citing *United States v. Estill*, 62 F.2d 620, 621 (10th Cir. 1932)) (emphasis added). The Court concluded that, in the case before it, the restriction on alienation remained in force because the land had been inherited after the heir returned to the United States. *Id.*

See De Lima v. Bidwell, 182 U.S. 1, 197 (1901) (statutory criteria are presumptively measured at the time of a statute's application). The Secretary's reading of Section 19 is implausible because it would result in the statute meaning *exactly* the same thing without the presence of the word "now." *See Hibbs*, 542 U.S. at 101.[4]

Moreover, none of the later-enacted statutes invoked by the Secretary and his *amici* modifies Section 19's unambiguous restriction on the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction in 1934. The 1994 IRA amendment, for example, that imposes a *general* prohibition on agency action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes" (25 U.S.C. § 476(f)) does not supersede the *specific* restrictions that Congress expressly imposed on the Secretary's trust authority in Section 19 of the IRA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute

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[4] In a final attempt to manufacture ambiguity in Section 19, the Secretary suggests that the phrase "now under federal jurisdiction" in Section 19 may modify "all persons of Indian descent," rather than "recognized Indian tribe[s]." U.S. Br. 20. Prior to this case, neither the Secretary nor any court had countenanced such a reading—which is flatly inconsistent with the rule of the last antecedent. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005). In any event, even if this reading were correct, it would not benefit the Narragansetts because the Tribe's members were not "under federal jurisdiction" at the time of the IRA's enactment. *See* J.A. 22a (1937 letter from Commissioner of Indian Affairs stating that the "Narragansett Indians have never been under the jurisdiction of the Federal Government").

dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). The same is true of the List Act, which does nothing more than require the Secretary to publish an annual list of tribes eligible for the "special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Until Congress enacts a statute that specifically expands the definition of "Indian" under the IRA to reach members of *all* federally recognized tribes—rather than members of only those tribes that were federally recognized and under federal jurisdiction in 1934—the temporal restrictions that Section 19 imposes on the Secretary's trust authority remain in force.

The United States and its *amici* are wrong when they contend that the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202, is such a statute. U.S. Br. 39; Nat'l Congress of Am. Indians Br. 6. That statute merely provides that the "provisions of section 5" of the IRA "shall apply to all tribes notwithstanding the provisions of section 18" of the IRA, which is the section that excludes from the statute those tribes that voted to opt out of its application within one year of enactment. 25 U.S.C. § 478. ILCA therefore extends the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction in 1934 but that voted to opt out of the IRA's application under Section 18 of the statute. It leaves intact the requirement imposed by *Section 19* of the IRA that a tribe have been federally recognized and under federal jurisdiction in 1934 in order to benefit from the Secretary's trust authority.

The Secretary's reliance on the Indian Gaming Regulatory Act ("IGRA") is equally misplaced. The IGRA authorizes gaming on land acquired in trust

after October 17, 1988, where that land is part of "the initial reservation of an Indian tribe acknowledged by the Secretary." 25 U.S.C. § 2719(b)(1)(B)(ii). Far from expanding the Secretary's trust authority under Section 5 of the IRA, the IGRA merely recognizes the possibility that land might be taken into trust on behalf of a newly recognized tribe if Congress explicitly extends the IRA to that tribe in a statute granting federal recognition or in a separately enacted provision. *See*, *e.g.*, *id.* § 1300b-14(a) (extending the IRA to the Texas Band of Kickapoo Indians); *id.* § 1300i-8(a)(2) (extending the IRA to the Yurok Tribe). In the absence of such explicit congressional action, the unambiguous language of Section 19 excludes newly recognized tribes from the scope of the Secretary's trust authority.

B. The Policies Animating The IRA Confirm That The Secretary Has Exceeded The Scope Of His Trust Authority.

The restrictions that Section 19 of the IRA explicitly imposes on the Secretary's trust authority are consistent with the IRA's objective of "repudiat[ing] the practice of allotment" (*Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001)), which left tens of thousands of Indians landless and substantially weakened the political and economic infrastructure of many tribes. The IRA prohibited further allotments of Indian lands (25 U.S.C. § 461) and established the trust mechanism to provide lands for those tribes and individual Indians who had lost their land through allotment. *Id.* § 465.

Because it was necessary that "the line . . . be drawn somewhere" in defining those Indians entitled to the IRA's benefits (3 *The American Indian and the*

United States (Wilcomb E. Washburn ed., 1973) (statement of Rep. Howard)), Congress carefully delineated three categories of Indians eligible to have land taken into trust on their behalf and to benefit from the IRA's other provisions. The first—and most frequently invoked—category comprises those Indians who are members of tribes that were federally recognized and under federal jurisdiction at the time of the statute's enactment, which are the tribes that were subject to the loss of land under the allotment policy.

The Secretary and his *amici* suggest that restricting this first definition of "Indian" to members of tribes that were federally recognized and under federal jurisdiction in 1934 would exclude a significant number of needy Indians from the IRA's benefits. But these arguments uniformly overlook the fact that the IRA creates two additional means of establishing eligibility for the statute's benefits (neither of which has been invoked by the Narragansetts or is at issue in this case). The IRA's definition of Indian extends not only to persons of Indian descent who are members of a tribe that was federally recognized and under federal jurisdiction in 1934, but also to descendants of such members who were living on a reservation on June 1, 1934, and to persons with one-half or more Indian blood. 25 U.S.C. § 479. Accordingly, those tribes that were not federally recognized and under federal jurisdiction in 1934 are not categorically excluded from the IRA, and may invoke all of the statute's benefits if their members satisfy either of the IRA's alternative definitions of "Indian." *See*, *e.g.*, *John*, 437 U.S. at 650 (concluding that the IRA applied to the Mississippi Choctaws, even though they were not federally recognized at the

time of its enactment, because they were "persons of one-half or more Indian blood").

Moreover, Congress has on a number of occasions enacted statutes that explicitly extended the IRA to tribes that would not otherwise have been eligible for the IRA's benefits. *See*, *e.g.*, 25 U.S.C. § 1300b-14(a); *id.* § 1300i-8(a)(2).

The contentions of the Secretary and his *amici* that giving effect to the plain meaning of Section 19 would greatly impair tribal interests are therefore substantially overstated and the product of an artificially narrow view of the mechanisms for establishing eligibility for the IRA's benefits. Even if that were not the case, however, these policy concerns would not provide a permissible ground for the Secretary's decision to disregard the IRA's unambiguous language restricting his trust authority to tribes that were federally recognized and under federal jurisdiction in 1934.

II. THE SETTLEMENT ACT PROHIBITS TRUST ACQUISITIONS IN THE STATE OF RHODE ISLAND.

The Secretary's acquisition of the 31-acre parcel in trust for the Tribe is also foreclosed by the Settlement Act, which extinguished "*all* claims" by the Tribe "based upon any interest in or right involving . . . land" that the Tribe had previously transferred to other landowners, including "claims for use and occupancy" of such land. 25 U.S.C. § 1705(a)(3) (emphasis added). The Secretary and Tribe attempt to constrict the Settlement Act's broad claims-extinguishment language and obscure the settling parties' clearly expressed intention to "eliminate[ ] *all* Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Is-

land." J.A. 27a (emphasis added). Their efforts are unavailing.

A. Invoking the court of appeals' reasoning, the Secretary asserts that there is "'simply nothing in the text of the Settlement Act . . . that accomplishes . . . a repeal or curtailment'" of his trust authority. U.S. Br. 41 (quoting Pet. App. 37). According to the Secretary, the Settlement Act's claims-extinguishment provision does nothing more than clear the clouds on title to land claimed by the Tribe in its 1975 lawsuits against landowners in the Town of Charlestown. *Id.* at 45. But any doubts about the validity of those titles were removed by the provision of the Settlement Act "deem[ing]" all of the Tribe's transfers of land within Rhode Island "to have been made in accordance with the Constitution and all laws of the United States." 25 U.S.C. § 1705(a)(1). That express congressional approval prohibited the Tribe from bringing suit based on the purported invalidity of those transfers. The claims-extinguishment provision must therefore serve a different purpose than simply preventing the Tribe from asserting claims contesting the validity of the transactions transferring its aboriginal lands to non-tribal members. To serve some function—which it must be presumed to do—the claims-extinguishment provision must encompass tribal land claims that are not based on these centuries-old land transactions.

Indeed, contrary to the Secretary's assertion, there is nothing in the broadly worded claims-extinguishment provision that restricts its application to "claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers" (U.S. Br. 44 (emphasis in original))—and the Secretary points to no such language. The claims-extinguishment provision instead

applies to "*all* claims" by the Tribe based on "*any* interest in or right involving land" transferred by the Tribe, and explicitly encompasses claims for "use and occupancy." 25 U.S.C. § 1705(a)(3) (emphases added).

The Tribe's trust application is a "claim" to sovereign authority over property that is currently subject to the civil and criminal jurisdiction of the State of Rhode Island and Town of Charlestown. *See* Tribe Br. 16 (defining a "claim" as "'a title to anything which another should give or concede to, or confer on, the claimant'") (quoting *Webster's New International Dictionary* 493 (2d ed. 1959)). If the Secretary's approval of the application is upheld by this Court, state and local jurisdiction over the parcel will be ousted and jurisdiction over the land will be conferred on the Tribe. *See* 25 C.F.R. § 1.4. The Tribe's claim to sovereign "use and occupancy" over the 31-acre parcel falls squarely within the Settlement Act's broad claims-extinguishment language. *See* Pet. App. 74-75 (Howard, J., dissenting) ("asking to have land taken into trust by the BIA under the IRA to effect an ouster of state jurisdiction is a quintessential 'Indian' land claim").

The Secretary and Tribe make much of the fact that several other Indian claims settlement acts include language that expressly restricts the Secretary's trust authority. U.S. Br. 46; Tribe Br. 29. But the Secretary and Tribe fail to mention that, unlike the Rhode Island settlement act, each of these other acts also contains a provision that expressly *authorizes* trust acquisitions. *See*, *e.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(d) (requiring the first 150,000 acres of land acquired for the Penobscot and Passamaquoddy to be held in trust); Connecticut Indian Lands Claims Settlement Act, 25

U.S.C. § 1754(b)(7); Massachusetts Indian Claims Settlement Act, 25 U.S.C. § 1771d(d). Because Congress did not intend for the Secretary to possess unrestricted trust authority in these States, it was also necessary for Congress to include provisions in each of these acts that explicitly imposed limitations on the scope of that authority. Thus, far from supporting the Secretary's narrow reading of the Rhode Island settlement act, these statutes establish that when Congress intends to permit trust acquisitions to continue after the enactment of a settlement act with broad claims-extinguishment language, it includes explicit authorization for such acquisitions in the text of the act itself. The Rhode Island Indian Claims Settlement Act includes no such authorization.

B. The Secretary's narrow reading of the Settlement Act is also at odds with the statute's objective of "eliminat[ing] all Indian claims of any kind" involving land in Rhode Island. J.A. 42. The Secretary makes little effort to explain why the State would conceivably have agreed to the terms of the Settlement Act as construed by the Secretary. Indeed, it would have made little sense for the State to have agreed to a settlement intended to "eliminate all Indian [land] claims" in the State if that settlement left the Tribe, upon receiving federal recognition, free to request that the Secretary acquire an unlimited amount of land in trust on its behalf and divest the State of criminal and civil jurisdiction over that land. The Secretary's far-reaching trust authority is incompatible with the Settlement Act's careful compromise among the sovereign interests of the federal, state, and tribal governments.

Nor is the Secretary able to draw a meaningful distinction between the Settlement Act and the

Alaska Native Claims Settlement Act ("ANCSA"), which the Secretary has construed as foreclosing trust acquisitions in Alaska. *See* U.S. Dep't of the Interior Solicitor Op. M-36975, at 107-08, 123 n.296 (Jan. 19, 1993) ("1993 Solicitor Op."). The Secretary asserts that the two statutes are distinguishable because, unlike ANCSA, which "virtually eliminated all reservations in Alaska," "the Rhode Island act *created* a land base for the then-landless Narragansett." U.S. Br. 49 (emphasis in original). The Secretary neglects to mention, however, that there were no—and have never been any—reservations in Rhode Island for the Settlement Act to eliminate. Thus, significantly more probative than this superficial distinction is the fact that the Settlement Act established precisely the same land base for the Narragansetts—land held in fee simple by a state-chartered corporation controlled by tribal members—as ANCSA did for Alaska Natives. *See* Carcieri Br. 45-47.

The Secretary also emphasizes that the Department of the Interior has rescinded a 1978 Solicitor's Opinion that concluded that it would be an "abuse of discretion" for the Secretary to take land into trust in Alaska. U.S. Br. 51; *see also* Tribe Br. 33 (the 1978 Opinion concluded "that the intent and purpose of the ANCSA was to prohibit trust acquisitions by the Secretary"). Despite this rescission, the Secretary's near-contemporaneous construction of the ANCSA remains entitled to significant deference. *See Bank-America Corp.*, 462 U.S. at 130. In any event, the Department has not rescinded its 1993 Solicitor's Opinion construing ANCSA. That opinion concluded that "Congress has left little or no room for tribes in Alaska to exercise governmental authority over land" and that the "statutory scheme established in

ANCSA precludes the treatment of lands under that Act as Indian country." 1993 Solicitor Op., *supra*, at 108, 131. The Secretary has recently reaffirmed that conclusion in litigation challenging his refusal to take land into trust in Alaska. *See* Reply in Support of Cross-Motion for Summary Judgment at 14, Akiachak Native Cmty. v. Dep't of the Interior, No. 06-969 (filed July 25, 2008) ("the express intent of [ANCSA] was to avoid the continuation and/or creation of 'a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska'") (quoting 43 U.S.C. § 1601(b)).

Because the Settlement Act, like ANCSA, is incompatible with the Tribe's alleged right to "exercise governmental authority over land," the Secretary is barred from taking the 31-acre parcel into trust on behalf of the Tribe.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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